

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: June 8, 2018

CLAIM NO. 201495922

JAMES CRUME

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE**

BROWN FORMAN CORP.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING IN PART
& REMANDING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. James Crume ("Crume") seeks review of the April 24, 2017, Opinion, Award, and Order of Hon. Grant S. Roark, Administrative Law Judge ("ALJ") finding Crume sustained a work-related injury on January 28, 2014, while in the employ of Brown Forman Corp. ("Brown Forman"). The ALJ determined the injury resulted in a 6% impairment

rating and awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. The ALJ ordered the award of income benefits to terminate, pursuant to KRS 342.730(4) as enacted in 1996, when Crume qualified for normal old-age Social Security retirement benefits. Crume's birth date is February 4, 1951. Crume filed a petition for reconsideration pointing out a typographical error. He did not raise the constitutionality of the 1996 version of KRS 342.730(4). In the May 25, 2017, Order ruling on the petition for reconsideration, the ALJ corrected the typographical error relating to the award of TTD benefits. The remainder of the opinion remained unchanged. Crume also appeals from the May 25, 2017, Order.

PROCEDURAL BACKGROUND

After Crume filed his Notice of Appeal, by Order dated July 26, 2017, the Board placed the appeal in abeyance pending the finality of Parker v. Webster County Coal, LLC (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017). The parties were to file status reports. After the Kentucky Supreme Court's decision in Parker became final, by Order dated February 14, 2018, the Board removed the appeal from abeyance and set a briefing schedule.

On appeal, Crume argues the ALJ erred in limiting his benefits pursuant to KRS 342.730(4) enacted in 1996. In a related argument, Crume acknowledges the Board has recently ruled, in light of the Parker decision, the tier-down provision in KRS 342.730(4) enacted in 1994 is now in effect. Crume asserts the Board's reasoning ignores the "severability statute" (KRS 446.090) and that the Parker decision only struck down KRS 342.730(4) as unconstitutional and not all of section 730. Crume argues the current version of KRS 342.730 does not state the remainder of the statute is deemed null and void if one sub-section of the statute is deemed unconstitutional. Crume also asserts the remaining sections of the statute are not so essentially and inseparably connected with sub-section 4 that they are incapable of standing alone. Crume relies upon the Supreme Court's holding in Cruse v. Henderson County Board of Education, 2015-SC-000506-WC, rendered December 14, 2017, Designated Not To Be Published, in which income benefits were awarded to an older worker without the application of the tier-down version of KRS 342.730(4) enacted in 1994. Thus, he contends the Cruse case when read in conjunction with Parker directs that there are no limitations on the award of income benefits per KRS 342.730(4).

ANALYSIS

We first address the fact Crume did not raise the constitutionality issue in his petition for reconsideration. That fact does not prohibit Crume from asserting the award is not in conformity with Kentucky law based on the Supreme Court's holding in Parker. As an appellate tribunal, on questions of law, as in the case *sub judice*, this Board's standard of review is *de novo*. See Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). Further, KRS 342.285(2) charges this Board with ensuring all orders, decisions, and awards are in conformity with the existing statutes.

In response, Brown Forman argues the matter should be remanded to the ALJ to tier-down Crume's PPD benefits in accordance with the 1994 version of KRS 342.730(4). In addition, Brown Forman notes the Kentucky Legislature recently enacted and the Governor signed legislation which reforms the workers' compensation law. Brown Forman asserts the new version of KRS 342.730(4) eliminates any reference to Social Security and caps income benefits at age 70 or four years after the date of the injury, whichever occurs last. Thus, it contends the Board should direct the ALJ to reconsider his decision "based upon the current law which imposes a non-discriminatory age

cap." We vacate the award of PPD benefits and remand for entry of an award imposing the tier-down provisions contained in the 1994 version of KRS 342.730(4).

We recently addressed Crume's argument in Pickett v. Ford Motor Co., 2015-01910, rendered February 16, 2018, holding as follows:

The version of KRS 342.730(4) the Parker Court deemed unconstitutional, enacted in 1996, states in pertinent part:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

In Parker, supra, the Kentucky Supreme Court concluded the manner in which income benefits were limited in the 1996 version of KRS 342.730(4) is unconstitutional. In so ruling, the Supreme Court stated, in part, as follows:

[T]he equal protection problem with KRS 342.730(4) is that it treats injured older workers who qualify for normal old-age Social Security retirement benefits differently than it treats injured older workers who do not qualify. As Justice

Graves noted in his dissent in *McDowell*, "Kentucky teachers ... have a retirement program and do not participate in social security." 84 S.W.3d at 79. Thus, a teacher who has not had any outside employment and who suffers a work-related injury will not be subject to the limitation in KRS 342.730(4) because that teacher will never qualify for Social Security retirement benefits. There is no rational basis for treating all other workers in the Commonwealth differently than teachers. Both sets of workers will qualify for retirement benefits and both have contributed, in part, to their "retirement plans." However, while teachers will receive all of the workers' compensation income benefits to which they are entitled, nearly every other worker in the Commonwealth will not. This disparate treatment does not accomplish the goals posited as the rational bases for KRS 342.730(4). The statute does prevent duplication of benefits, but only for non-teachers because, while nearly every other worker is foreclosed from receiving "duplicate benefits," teachers are not.

Id. at 768 (emphasis added).

The Supreme Court determined the 1996 version of KRS 342.730(4) does not pass constitutional muster because it treats injured older workers in the Commonwealth who *do not* qualify for

old-age Social Security benefits, such as teachers, differently from all other injured older workers in the Commonwealth who qualify for old-age Social Security benefits. That said, the Supreme Court's pronouncement in Parker lacks guidance as to how income benefits should now be calculated for injured older workers. In other words, should income benefit calculations for injured older workers be devoid of any age-related restrictions or should income benefit calculations revert back to the previous version of KRS 342.730(4) immediately preceding the 1996 version? Having had another opportunity to offer guidance in Cruse v. Henderson, Not To Be Published, 2015-SC-00506-WC (December 14, 2017), the Supreme Court declined. Thus, this Board must turn to other sources in order to address this inquiry.

The previous version of KRS 342.730(4) reads as follows:

If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

The above-cited language does not induce the same constitutional quandary identified by the Parker Court, as the tier-down directed in the previous version of KRS 342.730(4) does not

differentiate between injured older workers eligible for old-age Social Security benefits and those who are not. All workers injured before the age of sixty-five are subject to the tier-down provisions regardless of their eligibility for Social Security benefits. The previous version of KRS 342.730(4) does, however, differentiate between injured younger workers and injured older workers, because those injured above the age of sixty-five are not subjected to the tier-down. The Parker Court has already addressed the rational basis of providing for such a distinction:

The rational bases for treating younger and older workers differently is: (1) it prevents duplication of benefits; and (2) it results in savings for the workers' compensation system. Undoubtedly, both of these are rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so.

Id. at 768.

However, there must be a determination of whether the Supreme Court's pronouncement in Parker revives the previous iteration of KRS 342.730(4).

KRS 446.160 states as follows:

If any provision of the Kentucky Revised Statutes, derived from an act that

amended or repealed a pre-existing statute, is held unconstitutional, the general repeal of all former statutes by the act enacting the Kentucky Revised Statutes shall not prevent the pre-existing statute from being law if that appears to have been the intent of the General Assembly. (emphasis added).

In making an educated assessment of the legislative intent at the time the current version of KRS 342.730(4) was enacted in 1996, we turn to a contemporaneous provision, contained in the 1996 legislation, in which the legislature addressed the dire need to preserve the long-term solvency of the Special Fund, now the Division of Workers' Compensation Funds, which reads as follows:

Section 90. The General Assembly finds and declares that workers who incur injuries covered by KRS Chapter 342 are not assured that prescribed benefits will be promptly delivered, mechanisms designed to establish the long-term solvency of the special fund have failed to reduce its unfunded competitive disadvantage due to the cost of securing worker's vitality of the Commonwealth's economy and the jobs and well-being of its workforce. Whereas it is in the interest of all citizens that the provisions of this Act shall be implemented as soon as possible, an emergency is

declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

The language of Section 90 indicates the legislature, at the time the 1996 version of KRS 342.730(4) was enacted, intended to preserve the solvency of the Special Fund. Indeed, the language used in Section 90 speaks to this intent as being "an emergency." This legislative intent cannot be ignored in the wake of the Supreme Court's determination the 1996 version of KRS 342.730(4) is unconstitutional. This expressed concern certainly bolsters the conclusion the legislature contemplated a revival of the tier-down provisions in the previous version of KRS 342.730(4).

Accordingly, we hold that income benefits are to be calculated pursuant to the tier-down formula as set forth in the pre-existing version of KRS 342.730(4) in place when the statute in question was enacted in 1996. As the record indicates Pickett was sixty at the time of the July 13, 2015, injury to his left shoulder, and the ALJ awarded PPD benefits commencing on July 13, 2015, we vacate the ALJ's award of PPD benefits which are "subject to the limitations set forth in KRS 342.730(4)" and remand for a revised calculation of PPD benefits and an amended award consistent with the views set forth herein.

Crume's reliance upon Cruse is misplaced. Cruse was seventy-one years old at the time of her injury, thus, the tier-down provision in the 1994 version of KRS

342.730(4) was not implicated. Since Crume was 66 years of age on the date of injury, the tier-down provision of KRS 342.730(4) enacted in 1994 is applicable. Also, noticeably absent in Cruse is any language from the Supreme Court indicating since KRS 342.730(4) is unconstitutional, the claimant is entitled to an unaltered award of income benefits. The Supreme Court's refusal to make such a statement led to our decision in Pickett, and we will consistently adhere to our decision until informed otherwise.

Therefore, paragraph 2 under the heading "Order & Award" in the ALJ's April 24, 2017, Opinion, Award, and Order which directs Crume shall receive benefits "beginning January 28, 2014, and continuing until he qualifies for normal, old age Social Security retirement benefits" is vacated. Since at the time of the injury, Crume was not 65 years of age or older, this claim will be remanded to the ALJ for entry of an amended opinion and award subjecting the award of income benefits to the tier-down provisions as contained in KRS 342.730(4) enacted in 1994.

Further, we find no merit in Brown Forman's contention that Crume's award is subject to the limits of

House Bill 2 which has yet to take effect.¹ Because this law was not in effect at the time of the injury and the ALJ's award, and it will not be in effect at the time of the rendition of this opinion, we decline to entertain this argument.

Accordingly, the ALJ's April 24, 2017, Opinion, Award, and Order is **VACATED** in part. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award subjecting the award of PPD benefits to the tier-down provision contained in KRS 342.730(4) enacted in 1994.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON WAYNE C DAUB
600 W MAIN ST STE 300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON DAVID BLACK
101 S FIFTH ST STE 2500
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
657 CHAMBERLIN AVE
FRANKFORT KY 40601

¹ House Bill 2 will not take effect until July 14, 2018.